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passed, after the buyer's default has lasted an unreasonable time, is allowed to sell again without formalities, and without notice to the buyer, provided that he exercises reasonable care and judgment in such a sale. Notice to the defaulting buyer is only material on the question as to whether the buyer has in fact been in default an unreasonable time. This procedure is more in accord with mercantile convenience requiring summary methods in dealing with goods than the California rule demanding statutory formalities, especially in view of the pitfalls the latter rule affords for both the business and legal profession. *H. B. S.*

VENDOR AND PURCHASER: RISK OF DEPRECIATION IN VALUE OF LAND ON PURCHASER—Suppose a flood washes away four out of ten acres after a buyer goes into possession under an executory contract of sale. May the seller get specific performance despite the destruction of part of the *res?* No, says Cooper v. Huntington,[1] the risk of loss is on the vendor who has legal title, citing with approval an analogous case[2] where a purchaser in possession recovered the entire price already paid when fire destroyed part of the premises before a conveyance was to be made. Accordingly it has been considered well established in California that (irrespective of possession) risk of loss follows legal title,[3] the Supreme Court having long repudiated the contrary rule established by the English Court of Chancery and frequently followed in America.[4]

Would it make any difference if a flood in the vicinity of the premises merely caused a depreciation in the value of the *res* without the destruction of any part of it?[5] Should the risk of loss in this case also rest on the vendor? In *McCarty v. Wilson,*[6]

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[1] (1918) 178 Cal. 160, 172 Pac. 591; 8 California Law Review, 195.

[2] Thompson v. Gould (1838) 37 Mass. (20 Pick.) 134. The latest Massachusetts case follows the rule: Libman v. Levenson (June 28, 1920) 128 N. E. 13.

[3] Vendor in possession: Smith v. Phoenix Insurance Company (1891) 91 Cal. 323, 27 Pac. 738, 25 Am. St. Rep. 191, 13 L. R. A. 475; Conlin v. Osborn (1911) 161 Cal. 659, 120 Pac. 755.

Purchaser in possession: Wong Ah Sure v. Ty Fook (1918) 37 Cal. App. 465, 174 Pac. 64; Cooper v. Huntington, supra, n. 1; La Chance v. Brown (1919) 28 Cal. App. Dec. 1350, 183 Pac. 216, Orrin K. McMurray in 7 California Law Review, 454.

Vendor in possession of leasehold, title to which had passed to purchaser, loss fell on purchaser: Potts Drug Co. v. Benedict (1909) 156 Cal. 322, 104 Pac. 432.

Personal property, accord: Kirtley v. Perham (1917) 176 Cal. 333, 168 Pac. 351; Waltz v. Silviera (1914) 25 Cal. App. 717, 145 Pac. 169.

See generally: 8 California Law Review, 194.

[4] Idem.

[5] This situation is suggested by the following language: "the value of said premises depreciated to the extent of $50 per acre . . . . by reason of a change in the course of the San Gabriel River in the vicinity of said premises at the time of the great flood of February 1914." McCarty v. Wilson (1919) 30 Cal. App. Dec. 106, 110.

[6] (October 20, 1920) 60 Cal. Dec. 491, 494, 193 Pac. 578, reversing 30 Cal. App. Dec. 106.

where the sale was made in probate and had been finally confirmed before the facts causing depreciation in value occurred, defendant claimed to be excused from performance by the circumstance that the property suffered a ten per cent depreciation in value by reason of a flood. Mr. Justice Lennon answered this contention as follows: "Bearing in mind that prior to the injury to the property defendant was in equity the owner of the land; that he was unquestionably entitled to the possession of the land under the contract with the estate, and that he had actually gone upon the land with men and teams and done about $1,700 worth of grading, we have no doubt that the risk of loss was upon him." In denying defendant's petition for a rehearing[7] the court distinguished the instant case from cases relied upon by petitioner by the fact that "upon the confirmation of the sale the whole purchase price became due and payable, at least upon the original tender and deposit of the deed by the executor."

We do not desire to criticize the soundness of the decision. But the language of the court may be open to the interpretation that the doctrine of equitable conversion in risk of loss cases is still a part of the law of this state. As pointed out before, in such cases, this doctrine has been rejected by the California courts time after time.

Under the facts of the case, might not the court have adopted another distinction? At the time of making a contract the buyer agrees to take the property irrespective of fluctuations in value[8] provided that on the due day it is substantially all there. Indeed that is the very purpose of a contract. Risk of loss from mere depreciation in value (as distinguished from loss by destruction) is within the contemplation of the purchaser from the moment the contract is signed, and is independent of possession.[9] Where, however, fire or flood destroys part of the premises the seller cannot fully perform as he has promised, and the vendee, against his will, is not obliged to pay for ashes or materially less land than he has bargained for. But when, as in the principal case, the probate court had confirmed the sale and the executor had tendered full performance prior to the date of injury, thereafter it would seem appropriate that the burden of the risk of loss should no longer be on him.[10]

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[7] (November 19, 1920) 60 Cal. Dec. 583.

[8] See 5 Pomeroy's Equity Jurisprudence (4th ed.) § 2219, 2220. Query: if there had been a destruction of the land, would ten per cent constitute a "material" failure of consideration within the meaning of the Civil Code, § 1689, subdiv. 4? Defendant, in the petition for rehearing, stated that there was a loss of part of the premises.

[9] "A contract for a deed of land adjoining the Missouri River cannot be rescinded for depreciation on account of a change in the course of the river, as the possibility of such a change must have been known at the time of the contract." Tuttle v. King (1917) 181 Iowa 288, 164 N. W. 616, syllabus.

[10] As to the conclusiveness upon the purchaser of an order of the court confirming a sale, see Hammond v. Cailleaud (1896) 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167.

No authority is cited by the court in disposing of defendant's contention; it was only subsidiary to the main issues of the case.[11] And of course, the language must not be considered in any way as detracting from the force of the California rule established since 1891 in destruction cases. Whatever the purposes of the doctrine of equitable conversion, it was not intended to compel the purchaser of land to pay for something he did not and could not get on the due day. *J. J. P.—J. C. S.*

WORKMAN'S COMPENSATION ACTS: WHAT IS INTERSTATE COMMERCE WITHIN THE FEDERAL ACT?—The conflict between Federal and state authority, which has always been an important factor in our national history, has presented a practical difficulty in the application of the Federal Employers' Liability Act,[1] which provides the exclusive remedy for a railroad employee when injured in interstate commerce.[2] In all other cases the law of the state applies. The question whether the employment was interstate or intrastate in character has been the source of much unfortunate litigation during the last ten years, and now even with the help of manifold precedents, an injured workman may be at a total loss to know whether he must institute his action under Federal or state law. This appears from two decisions in the California courts. In *Hines v. Industrial Accident Commission*[3] it was held that an employee in the Southern Pacific Company's shops, who was injured while repairing a switch engine, used to haul both interstate and intrastate commerce indiscriminately, was not engaged in interstate commerce within the meaning of the Act and was properly awarded compensation under the California Workmen's Compensation Act. But in *Payne v. Industrial Accident Commission*[4] a shop employee who was injured while repairing an engine used before and after repairs on an interstate run, was said to be engaged in interstate commerce and denied a recovery under the California act.

The distinction between interstate and intrastate commerce for the purposes of this act is made as follows by the Supreme court of the United States: "Was the work being done independently of the interstate commerce in which the defendant was engaged, or

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[11] "It is, therefore, doubtful whether the defendant, having failed to appeal from the order confirming the sale, which fixed his liability as a purchaser, has the right to set up, as a defense to the action for the purchase price, alleged defects in the title which were within his knowledge at the time the order of confirmation was made." "Supra, n. 6, p. 494.

[1] 35 U. S. Stats. at L. 65, U. S. Comp. Stats. (1913 and 1918) §§ 8657-8665, 8 Fed. Stats. Ann. (2d. ed.) 1208, Barnes, Fed. Code, § 8069 ff.

[2] Second Employers' Liability Cases (1907) 223 U. S. 1, 53, 56 L. Ed. 327, 32 Sup. Ct. Rep. 109; Michigan Central R. R. Co. v. Vreeland (1912) 227 U. S. 59, 66, 57 L. Ed. 442, 33 Sup. Ct. Rep. 229; Seaboard Air Line v. Horton (1913) 233 U. S. 492, 501, 58 L. Ed. 1062, 34 Sup. Ct. Rep. 635; New York Central R. R. Co. v. Winfield (1916) 244 U. S. 147, 61 L. Ed. 1045, 37 Sup. Ct. Rep. 546.

[3] (Oct. 4, 1920) 60 Cal. Dec. 365, 192 Pac. 859.

[4] (Nov. 26, 1920) 33 Cal. App. Dec. 634.